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Supreme Court of the United States

October Term, 1977

Nos. 77-498 and 77-538

MANUEL ALFONSO RODRIGUEZ, Petitioner

v.

UNITED STATES OF AMERICA

RAYMOND GERALDO, Petitioner

v.

UNITED STATES OF AMERICA

On Petitions For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

REPLY BRIEF IN SUPPORT OF PETITION

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Petitioner,

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION

This reply brief is submitted in support of the petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit.

POINT I

THE GOVERNMENT INDICTED, TRIED, AND CONVICTED THE PETITIONER RODRIGUEZ BY THE KNOWING USE OF FALSE MATERIAL EVIDENCE

The government's case against Rodriguez on both count 1 and count 3 was based on the charge in the indictment that *Rodriguez signed the end use certificate*, which was described in the indictment as "a certificate dated April 22, 1976 *bearing the signature of defendant Manuel Alfonso Rodriguez.*" (Pet. 12, 16) The government's *entire* case against Rodriguez was tried on false evidence that *Rodriguez signed the end use certificate.* (Pet. 17-19; 12a-20a; infra).

The government obtained the conviction of Rodriguez upon false evidence that *Rodriguez signed the end use certificate.* (Pet. 17-39; 12a-20a; *infra*.)

The government knew even *before* the return of the indictment that Miguel Celis had *forged* Rodriguez' "signature" onto three blank sheets of letterhead paper of the office of the Estado Mayor General de la Fuerza Armada, San Salvador, El Salvador, i.e., the office of the Chief of Staff of the Armed Forces of El Salvador. (Pet., pp. 12a-20a). This later became the end use certificate (Tr. 253-254) (Pet. 21a-24a).

The government concealed these facts. It *never* disclosed either to the trial court, or to the jury, or to the defense counsel, *that Miguel Celis had forged Rodriguez "signature" on it by tracing it thereon.* Even though at all times it *knew* these facts (Pet. pp. 12a-20a). These facts were discovered and exposed by present appellate counsel after the judgment of conviction was entered during the preparation of the appeal therefrom (Pet. 18-19; 12a-20a).

After these facts were exposed, the government could not

deny that Miguel Celis had forged Rodriguez' signature on the end use certificate (Pet. pp. 12a-20a).

It is undisputable that had the government disclosed this critical exculpatory evidence, namely, that *Miguel Celis had forged Rodriguez' signature onto the end use certificate* (Pet. pp. 12a-20a), Rodriguez would have been acquitted (See Point II, *infra*).

Instead of disclosing the fact that Miguel Celis had forged Rodriguez' "signature" on the end use certificate, the prosecutor deliberately, aggressively, persistently and consistently argued and presented evidence to the jury and the trial court that *Rodriguez signed the end use certificate*, knowing those arguments and evidence were false (Pet. 17-19).

The government seeks to avoid the consequences of its grave prosecutorial misconduct by the disingenous argument that:

> "The claim that the prosecution advanced the false *theory* (sic) that Rodriguez actually signed the end use certificate *is directly contrary to the representations (sic) of government counsel at trial. The United States Attorney stated to both the district court and defense counsel during the trial that the government did not claim that Rodriguez had personally signed the document* (Tr. 256)." (Resp. Br. pp. 6,7). (Italics and matter in parenthesis added.)

The government's brief carried footnote 5, which further asserted that the government did claim that the signature had been placed on the "end use certificate" with Rodriguez' full knowledge and authorization (Tr. 256). . . ." (Italics and matter in parenthesis added.) The government continued the quoted footnote statement with the non-sequitur that:

> "The good faith basis for that claim is contained *in the grand jury (sic)* testimony of co-defendant

> Celis, which was submitted under seal to the district court in response to an unsuccessful post-trial motion raising these same allegations."[1] (Italics and matter in parenthesis added.)

The record does not support, and totally discredits, the government's assertions to this Court. It is notable that even the government does not claim that there is anything in the *trial record* to support its assertion of a "good faith basis for that *claim* (that) the signature had been placed on the 'end use certificate' with Rodriguez' full knowledge and authorization." (Resp. br. fn. 5). (Matter in parenthesis and italics added.) It points only to undisclosed *grand jury* testimony of Miguel Celis. The fact is that there is not one scintilla of evidence presented by the government *in the trial record*—that someone else, *other than Rodriguez, signed the end use certificate. All of the evidence* presented by the prosecutor at the trial was that *Rodriguez signed the end use certificate.* There is no evidence in the trial record for the government's assertion in this Court that "the government did not *claim* that Rodriguez signed the end use certificate." (Res. Br. pp. 6, 7).

The trial record shows that the prosecutor deliberately, aggressively, willfully, and repeatedly, *claimed, contended, argued and represented* that *Rodriguez had signed the end use certificate* in his opening statement to the jury (Tr. 8, 9, 16, 17, 18, 19, 25, 30), in the presentation of evidence to the jury (Tr. 251-254, 264, 266-268, 270-272, 277, 279, 298-299, 300, 484, 486, 571, 584, 586, 607-609, 585-593, 623-627, 630-631), in his arguments to the trial court at end of trial

1. Prior to the perfection of the appeal to the Court of Appeals, Rodriguez filed a petition for a writ of habeas corpus to the District Court which raised this and other issues. The District Court denied the petition *without prejudice* by reason of the pendency of the appeal. The government's opposition to the petition for a writ of habeas corpus was that the same issues were pending appeal.

(Tr. 715-718, 720-721), in his requests to the trial court to charge the jury (Tr. 727, 891-892, 894), in his closing statements to the jury (Tr. 741, 742, 748-750, 752, 762, 764-766, 849-850).

The trial record shows that the so-called "representations of government counsel" were made at a chambers conference, *out of the presence of the jury* (Tr. 254-258). The jury *never heard* any of the "representations" made by that prosecutor (Tr. 254-258). This chambers conference occurred on September 24, 1976, the fourth day of the trial (Tr. 240). The government's chief witness, Special Agent Joseph Kelly, was on his *second day* of direct examination (Tr. 51, 175, 240, 254).

Just prior to that chambers conference, the prosecutor had elicited hearsay testimony from Special Agent Kelly that *Rodriguez had signed the end use certificate.* (Tr. 252-254). Agent Kelly had just testified that on May 2, 1976 he had met Miguel Celis and Eduardo Suarez at a restaurant in Westchester County and that there, *Miguel Celis* told him that *Rodriguez had signed three blank letterhead sheets of paper which Celis had "removed from a folder he was carrying, three blank letters which had formal letterheads from El Salvador and which at the bottom of the page was signed with a signature."* (Tr. 252-254). The prosecutor had asked Special Agent Kelly just prior to that chambers conference:

> "Q. Was there any discussion of why the document was blank?
>
> A. Yes, sir. They explained that *Colonel Rodriguez had signed the document,* but they didn't want him to fill in any information because *they* wanted it done by us so we would give the proper identification of what we require so that it would pass through the State Department without any problems. (Tr. 254)
>
> Q. Would you look at the document that Mrs.

Alexander is showing you, which has been marked as *Government's Exhibit 11*, and tell us what that is?

A. There were three copies that Mr. Celis had brought with him of the document I described. *He had given me one of the copies in blank with a signature at the bottom and this is a copy.* (Tr. 254)

Q. In other words, he brought three blank letterheads with a signature on it, and that is one of them is that correct?

A. Yes, that is correct, sir. (Tr. 254)

Mr. Fiske: We offer it in evidence, Your Honor. (Tr. 254).

Mr. Lang: May counsel see it, please, Your Honor?

The Court: Sure.

Mr. Hallinan: May I have a short conference with Mr. Fiske *privately?* It doesn't involve anyone leaving the courtroom. (sic!) (Tr. 254).

Mr. Lang: I think conference relating to exhibits or potential exhibits should be with all parties in the courtroom. (Tr. 255)

The Court: Mr. Lang objects. If you and Mr. Fiske went to talk about it, come on inside. I will listen, too." (Tr. 255) (Italics and matter in parenthesis added.)

Government Exhibit 11, which was the subject of the robing room conference, is reproduced in Petition, page 21a. It is a blank letterhead sheet of paper bearing a "signature". Special Agent Kelly had just testified that Miguel Celis had said to him on May 2, 1976 that the signature was signed by Colonel Rodriguez, that "Colonel Rodriguez had *signed the document.*"[2] [*Tr. 253-254*].

2. The singular "document"—apparently a typographical error in the trial minutes and should be in the plural, since the reference to the three letterhead sheets of paper is clear.

Thereupon, the robing room conference took place *outside of the presence of the jury* (Tr. 255), as follows:

"Mr. Hallinan: Are you going to claim (sic) that the Colonel physically (sic) signed *this* document?"[3] (Tr. 255)

The prosecutor did not respond to that question but evaded it (Tr. 255):

"Mr. Fiske: I don't think we have to get to that.

Mr. Hallinan: We do for any voir dire that I might have.

The Court: Let me see it.

Mr. Fiske: *No, we are not going to claim that he signed it.*[4]

Mr. Hallinan: Then, I have no objection." (Tr. 257) (Italics and matter in parenthesis added.)

The prosecutor then immediately back tracked and altered his statement:

"*Mr. Fiske: Let's put it this way: we are not*

3. It was also strange and bizarre for defense trial counsel for Rodriguez to have sought a private conference with the prosecutor in open court, and to have sought to exclude the court and defense counsel for Geraldo therefrom. Mr. Hallinan needed only to have objected to the introduction of the prior, gravely prejudicial, hearsay testimony by Special Agent Kelly that Celis told him that Colonel Rodriguez had *signed* those three blank letterhead sheets of paper in order to have excluded it as to Rodriguez. Similarly, Mr. Hallinan needed only to have objected to the proferred Government Exhibit 11 in order to have excluded it as to Rodriguez. A simple objection would have required the government to prove the *authenticity* of the "signatures" of Rodriguez on those three blank sheets of letterhead paper. The government had not taken any handwriting exemplars of Rodriguez. It had no handwriting experts prepared to testify that they bore Rodriguez' signature. The simple objection would have led an effective trial counsel to the exposure of the government's misconduct. Also, a simple check of the court files in this case would have revealed the confession of Miguel Celis that *he had* forged Rodriguez' signature on the end use certificate. (Pet. 12a-20a).

4. "It" is a reference to Government Exhibit 11, Petition, p. 21a.

going to introduce any evidence that he physically signed it.[5]

The Court: Let's cut through all the niceties of going back and forth and asking questions and not answering them. Mr. Fiske, a very simple question: what Mr. Hallinan (Tr. 255-256) basically wants to know is, are you going to introduce handwriting evidence that this handwriting, if it be handwriting,[6] is the handwriting of the Colonel?

Mr. Hallinan: Or are they going to claim that because *he denies that is his signature.*

Mr. Fiske: Your Honor, we are not going to claim (sic!) that Colonel Rodriguez *himself* wrote *that* signature on *that* piece of paper.[7] On the other hand, we are very definitely *claiming* (sic!) *that signature appears on that paper*[8] *with the full authorization and knowledge of Colonel Rodriguez.*[9]

Mr. Hallinan: All right. I thought I understood that.(!!)

The Court: The reason he has a right to know about it now is whether *he* (sic) should call handwriting experts or scientific people.[9a]

---

5. The prosecutor's statement was not true. The prosecutor repeatedly presented evidence that Rodriguez had signed not only Government Exhibit 11, but also Government Exhibit 15, 19, and 31 (Pet. 21a-24a, as show *infra*.

6. See footnote 3.

7. The prosecutor was carefully limiting his statement to Government Exhibit 11 (see, Pet. 21a). But his statement was not truthful. The prosecutor had elicited testimony from Agent Kelly that Miguel Celis said that Rodriguez had signed that document and two others like it (Tr. 253-254).

8. See footnote 7.

9. See *infra*, Point II. See also, *infra* pp. 16-19; 22, 23; 26, 27; see also footnotes 22, 26-28.

9a. Rodriguez had no burden to prove that it was not his handwriting. It was a prosecution burden of proof. See also, footnote 3.

Mr. Hallinan: There is another document that I did talk to them about and they told me this with respect to the other document, too, so I dropped my idea of having a handwriting expert.

Mr. Fiske: There is another document that will go into evidence that I understand Mr. Hallinan is ready to stipulate that was, in fact, signed by Colonel Rodriguez (Tr. 256) (Tr. 257).

Mr. Hallinan: Yes.

Mr. Fiske: We are all set. Just so we understand, this document can go into evidence?

Mr. Hallinan: *I have no objection to that document.*[10]

The Court: Do you, Mr. Lang? It is a blank piece of paper--

Mr. Hallinan: How are you going to describe it, *with the name of Colonel Rodriguez?*

Mr. Fiske: *There has been nothing said as to whose name that is.*[11]

Mr. Fiske: There has been testimony already. Mr. Geraldo[11a] *said Mr. Rodriguez signed it. Mr. Geraldo* send it at the meeting, and that is *not* what *I* am saying." (Tr. 257).[12] (Italics and matter in parenthesis added.)

The robing room conference ended with that ambiguous

---

10. Government Exhibit 11 (Tr. 254, 258) (Pet. 21a).

11. The record shows that this statement is not true. Special Agent Kelly had just *testified that Celis and Suarez* (not *Geraldo*) had told him on May 2, 1976 that Colonel Rodriguez had signed *that* paper in blank and two others like it in blank (Tr. 253-254).

11a. See footnote 11 and 12b.

12. The prosecutor did indeed say that, and he repeatedly said that and introduced evidence that Rodriguez signed all of those Government Exhibits 11, 15, 19 and 31 (Pet. 21a-24a, 17-39), and herein.

bit of semantics by the prosecution (Tr. 257).*

The prosecutor, who, when pressed had represented ambiguously that "*we are not going to claim* that Rodriguez himself wrote that signature on that piece of paper (Tr. 256), namely, Government Exhibit 11 (Pet. p. 21a), *in that same robing room conference* regarding the offer into evidence of Government Exhibit 11 (Tr. 254, 258), did indeed *claim* that *Rodriguez did sign it.* The prosecutor stated: "*There has been testimony already. Mr. Geraldo*[12a] *said Mr. Rodriguez signed it.*" (Tr. 257). The prosecutor disingenuously added his semantics that "Mr. Geraldo[12b] said that at the meeting, and that is not what *I* am saying." (Tr. 257). But *he was indeed* saying that; he said it before the robing room conference, at the robing room conference, and after the robing room conference. (*Supra*, pp.3, et seq.).

The jury never heard any of the robing room statements of the prosecutor. When the trial judge and defense counsel returned to the courtroom, the court stated to the jury:

> "The Court: Okay, folks: I told you that matters of law logistics were matters for me. We just took care of a matter of logistics." (Tr. 257).
>
> Mr. Hallinan thereupon stated:
>
> "Mr. Hallinan: On the basis of our conversations, I have no objection to the introduction of that document.
>
> The Court: Mr. Lang? (Tr. 257) (Tr. 258)
>
> Mr. Lang: No objection, Your Honor.

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*The trial transcript apparently omitted the word "not". The response of the prosecutor confirms this. Also, see Tr. 584-585.

12a. See footnotes 11 and 23.

12b. Special Agent Kelly testified that *Miguel Celis*, not Geraldo, had told him that Rodriguez *signed* those three letterhead sheets of paper in blank (Tr. 253-254).

> The Court: Mark it in evidence. (Government's Exhibit 11 received in evidence.)
>
> Mr. Fiske: May I show it to the jury, Your Honor?
>
> The Court: Sure." (Tr. 258)

Immediately after the jury had examined Government Exhibit 11, the prosecutor elicited *further testimony from Special Agent Kelly*, that the "signature" of Rodriguez on those three blank sheets of letterhead paper, which later were typed up into the end use certificates (Pet. pp.21a-24a), was the "real" signature of Rodriguez, "that the signature is real" (Tr. 258) if "Colonel Rodriguez is real" (Tr. 258).

> (Tr. 258) "Mr. Fiske: Q. Agent Kelly, after Mr. Celis and Mr. Suarez came with Mr. Geraldo back to the meeting with this document that has just been shown to the jury, was there any discussion in their presence about the payment of the money?
>
> A. Yes.
>
> Q. Would you tell us about that?
>
> A. We again stated with Celis and Suarez present that we did not want to front any money or advance any money. We explained that we didn't know whose signature this was. It could be real or it could be unreal. We didn't know who Colonel Rodriguez was. *Michaelson responded that if the deal is legitimate, that is if the signature is real, Colonel Rodriguez is real.* If it goes to the State Department and the license is disapproved for some other reason, he would (Tr. 259) reimburse us the $25,000 that we advanced. However, if the signature was not correct, or there was no Colonel Rodriguez, he would give us any moneys that we laid out in advance." (Tr. 259). (Italics and matter in parenthesis added.)

The prosecutor elicited *further* testimony from Special Agent Kelly that Colonel Rodriguez was the one who was the actual signer (Tr. 259-262). Special Agent Kelly testified that he had made *a tape recording* of the conversation on May 2, 1976 at which Miguel Celis had stated that Colonel Rodriguez had *signed* the three sheets of letterhead paper in blank (Tr. 261-262). That tape was received in evidence as Exhibits 12 and 12B and played to the jury (Tr. 262). The tape played the voice identified by Special Agent Kelly as that of Miguel Celis, Special Agent Kelly, Michaelson, and Cagianese saying that those blank letterhead papers (GX 11, 15, 19, and 31) were *"signed by Rodriguez."* (Pet. pp. 23-25). After the playing of the tape (GX 12, 12B), the prosecutor continued to elicit testimony from Special Agent Kelly that *Rodriguez signed those three sheets of letterhead paper in blank* by the testimony of Kelly that on May 2, 1976 Celis "produced a copy of the blank end use certificate and handed it to Frank Alvarez for his inspection:

> Q. Agent Kelly when you refer to the blank end use certificate, what are you referring to?
>
> A. *The letter on the formal letterhead that was signed with a signature at the bottom*, but *the body of it was left blank*. Mr. Geraldo explained to Mr. Alvarez that we needed to know what they wanted put in the body of the letter. Alvarez began dictating the body of the letter to Mr. Geraldo who wrote it down on a yellow legal pad. When this was completed Mr. Geraldo asked Mr. Alvarez if he could use the typewriter in their offices at Mott Haven to type it up. Alvarez said 'No, No, I don't want it done here. Take it back to Wittington and have it done.'
>
> Q. In what language did Mr.Alvarez dictate to Mr. Geraldo?
>
> A. Spanish, Sir. We agreed that Geraldo, Celis

> and Suarez would go to Wittington's office and complete the needed form, and I told them I would join them back later that afternoon so that all documents could be completed and submitted to the State Department.
>
> Q. Did you wear a Nagra tape recorder for that meeting? (Tr. 263)
>
> (Tr. 264) A. Yes, Sir.
>
> Q. Did you make a tape recording of it?
>
> A. Yes, sir.
>
> Q. Is Exhibit 13 that tape?
>
> A. Yes, Sir." (Tr. 265)

Portions of that tape recording on May 3, 1976 are reproduced at page 25 of the Petition. Those tapes show that Special Agent Kelly declared that Colonel Rodriguez already signed those letterhead papers. (Stagg was a "confidential informant" for the government, Tr. 23). Thus, on that tape played by the prosecutor to the jury, Special Agent Kelly and Stagg vouched to Alvarez for the genuineness of the signature on those papers, that *"Colonel Rodriguez*, he's alleged to be the Chairman of the Joint Chiefs of Staff . . . The Boss . . . For San Salvador, El Salvador . . . *already signed them . . . his signature on the bottom.*" (Pet., p. 25). The prosecutor introduced into evidence as Exhibit 14 another Nagra tape alleged to have been made by Special Agent Kelly on the afternoon of May 3, 1976 (Tr. 267). The conversation between Michaelson and Special Agent Kelly repeated that the end use certificate was *"signed by Rodriguez and empty in the middle."* (Pet. p. 25).

The prosecutor elicited from Special Agent Kelly that the blank letterhead paper signed by Rodriguez (Tr. 252-254) was typed into "the completed end use certificate" (Tr. 267) on May 3, 1973 in New York:

> "Q. Let's go to the meeting with Mr. Michaelson

at the end of the day on May 3, and let me ask you whether Mr. Michaelson brought any documents with him to the meeting?

A. Yes, Mr. Michaelson arrived and gave to me the completed end use certificate and a purchase order from San Pan Trading Corporation to Mott Haven for 10,000 Bushmaster machine guns." (Tr. 267)

The prosecutor continued this same deliberate course of conduct of "claiming" and representing to the court and to the jury, and to defense counsel, that *Rodriguez signed those three letterhead sheets of paper in blank* which were typed up in New York into the end use certificate. (Tr. 264, 267; *supra*)

The prosecutor introduced Government Exhibit 15 into evidence without objection (Pet. p. 22a) (Tr. 270). That exhibit was *typed* in Spanish (Tr. 270-271). The prosecutor then had the official court Spanish language translator translate Government Exhibit 15 into English (Tr. 271-272). As the exhibit shows (Pet. p.22a), the "signature" has *typed* beneath it the *identification* of the signature, to wit: "Manuel Alfonso Rodriguez, Coronel De Artilleria D.E.M., Jefe Del E.M.G.F.A."[13] By the introduction of Government Exhibit 15 by the prosecutor with that *typed* identification of the "signature", the prosecutor was representing to the trial court and jury that that "signature" there, was *signed by Rodriguez.*

The prosecutor did not stop there. He had the official court Spanish translator translate that Government Exhibit 15 into English, as follows:

> "Mr. Hoffman: It has an *official* letterhead. It is dated the 22nd day of April, 1976, and addressed to San Pan Trading Corporation, No. 3 Wren

13. That is not Rodriguez' correct title.

> Drive, Woodbury, New York 11797. 'Gentlemen: This is to certify that the 10,000 Bushmaster machine guns that we have ordered from you are for the use of the Armed Forces of our country and will not be re-exported, neither transferred totally or in part, to a third party. God, Union, Liberty. *Signed by Manuel Alfonso Rodriguez, Chief of — there are some initials 'DMGFA.'* " (Tr. 271-272) (Italics added.)

That exhibit was then shown to the jury [Tr. 272]. The prosecutor did not disclose that Government Exhibit 15 was not signed by Manuel Alfonso Rodriguez. The prosecutor did not disclose that Government Exhibit 15 *had been forged by Miguel Celis by tracing the "signature" of Rodriguez thereon.*

Thereafter, the prosecutor elicited testimony from Special Agent Kelly, that a second form of end use certificate was typed up after Mr. Alvarez stated that the first form, Government Exhibit 15, was "not good enough" (Tr. 276), that Mr. Alvarez then dictated a second form to Mr. Suarez, who did the typing, using another of the blank letterheads "signed by Rodriguez", as Celis told Kelly, according to Kelly's testimony (Tr. 253-254). That second form, as typed up, was Government Exhibit 19 (Tr. 277) (Pet. p. 23a). Agent Kelly testified that "Exhibit 19 is the end use certificate with the second paragraph added" (Tr. 277), and was offered and received in evidence without objection! (Tr. 278). The trial court then stated to the jury:

> "The Court: Ladies and Gentlemen, I think that the government may ask you to consider the former end use certificate and this together, and you will see the difference.
>
> Mr. Fiske: What I would like to do Your Honor is show Exhibit 15 as well as . . . 19 . . . to the jury at this time" (Tr. 278, 279).

Thus, Government Exhibits 15 and 19 were tied together, as having been signed by Rodriguez (Tr. 277-279). The prosecutor elicited testimony from Special Agent Kelly that he had a conversation with Cagianese (a named defendant not on trial) wherein he told him "that Colonel Rodriguez was to come to New York on May 15 and at that time we were going to pay *him* (Rodriguez) $75,000 for *his* furnishing us with the *end use certificate*" (Tr. 298-299) (Matter in parenthesis added). (Also, Tr. 300.)

On cross-examination Special Agent Kelly was asked by Mr. Hallinan:

> (Tr. 484) "Q. . . . Government Exhibit 19, when did you first see that form? . . .
>
> A. Are you referring to the blank form or in its completed form?
>
> Q. That is a good distinction. When did you see it as a blank form?
>
> A. May 2, 1976.
>
> Q. Under what circumstances?
>
> A. *Miguel Celis handed* — three original copies of the blank form *signed by according to him, Colonel Rodriguez.*
>
> Q. Now, I am glad you said 'according to him' because *he put it to you on that occasion that the Colonel had signed this document, isn't that correct*? (Tr. 484)
>
> (Tr. 485) A. Yes, sir.
>
> Q. Didn't you learn subsequently that the Colonel had[13a] signed that document?
>
> Mr. Fiske: Your Honor, if Mr. Hallinan is referring to matters which Agent Kelly has learned during the course of the investigation *after the indictment*, then I think Agent Kelly is going to

13a. The trial transcript apparently omitted the word "not". The response of the prosecutor confirms this. Also, see Tr. 584-585.

> have to be permitted to tell everything he learned about the circumstances under which that document was signed. Then we are getting into total hearsay, your Honor, second or third times removed.
>
> The Court: Yes, I know.
>
> Mr. Fiske: This is a matter it seems to me, your Honor, that is capable of direct proof. I might just say, your Honor —
>
> The Court: No, let me think for a moment.
>
> Mr. Fiske: Sure. Mr. Hallinan, would you accept for the time being at least an answer to the question whether he had any personal knowledge as of the time that he received these documents on May — what was it?
>
> The Witness (Special Agent Kelly): The 4th I received the document.
>
> The Court: *Whether Colonel Rodriguez signed the document.* Did you know? (Tr. 485)
>
> (Tr. 486) The Witness (Kelly): *I was told he had signed it.*That is as far as I knew.
>
> The Court: All right.
>
> Mr. Hallinan: Is your Honor finished?
>
> The Court: Sure. Do you want me to go ahead?
>
> Q. *On that date, Agent Kelly, it was put to you by Celis that the Colonel had signed that document, isn't that correct?*
>
> A. *Yes, sir.*
>
> Q. It was blank *when you first saw it?*
>
> A. Other than *the signature*, that is correct.
>
> Q. How many copies were there?
>
> A. Three.
>
> Q. Do you know what happened to those copies?
>
> A. One of them we took, I took. The other two were brought the following day to Mott Haven Truck Parts. I saw them again that morning.

Subsequently, the next day, May 4th, again I saw them filled out, completed.

The Court: When you say 'them' what are you referring to? The one you took?

The Witness (Kelly): There were three copies originally. The one I took I kept and it was never returned. The second copy was the one that was completed. (Tr. 486) (Tr. 487) The third I never saw again. I don't know what happened to it."

The prosecutor had the opportunity to disclose the true facts known to him that Rodriguez had not signed the "certificates", and that Miguel Celis had forged Rodriguez' signature thereon. (Pet. 12a-20a). The prosecutor, knowing the truth, remained silent.

On redirect examination of Special Agent Kelly, the prosecutor again elicited testimony that *Rodriguez* had *signed* the "certificates" (Tr. 570-571):

"Q. You testified on direct examination — and I am not going to ask you about it again — about some conversations (Tr. 570) (Tr. 571) with Mr. Gerlado (sic) and Mr. Celis at that meeting. I would like to ask you whether in addition to statements made by Mr. Geraldo and Mr. Celis anything was said at that meeting by Mr. Michaelson on the subject of Mr. Celis and Mr. Geraldo and Colonel Rodriguez?

A. Mr. Michaelson —

Mr. Lang: Objection.

The Court: No, I will permit it. Go ahead.

A. *Mr. Michaelson told us that the Colonel had signed the certificate for us and that he was a real person and he had verified this himself.*" (Tr. 571).

On re-direct examination of Special Agent Kelly, the

13b. See footnotes 11 and 12b, and 19; supra, pp. 4, 5; Petition 22, 23.

prosecutor deliberately elicited the following:

"Q. Agent Kelly, Mr. Hallinan asked you whether you heard at some time that *Colonel Rodriguez did not sign the document that has been described as the end use certificate, and you answered, yes, is that correct*?

A.That's correct, sir.

Q. Did you hear that at some time after the indictment was filed in this case?

A. Yes, sir.

Q. As a part of the investigation —

The Court: Well, no, he heard it after the (Tr. 584) (Tr. 585) arrest, which I think would be appropriate? Is that correct?

The Witness (Kelly): That is *also* correct, your Honor."

The trial court called a jury recess (Tr. 585). Out of the presence of the jury, the trial court inquired of the prosecutor if he was going into the "post-arrest interview" of Rodriguez. There was a robing room conference (Tr. 586). In the robing room conference the prosecutor turned aside the challenge by the defense to Special Agent Kelly that he, Kelly, had learned that Rodriguez did *not* sign the "certificate dated April 22, 1976." The prosecutor again concealed the true facts that Rodriguez did not sign the "end use certificate" and that Miguel Celis had *forged* Rodriguez' 'signature' thereon (Tr. 586). The prosecutor switched the inquiry into another channel saying that the question that should be put to Kelly is:

"Is it fair to say that when you said you heard that Colonel Rodriguez did not sign the end use certificate *you were referring* to the fact that Colonel Rodriguez *claimed that he did not — said he did not sign the end use certificate.*

Mr. Hallinan: No, I won't agree to that. I think

by his answer he opened up that question. No, No, No. *He heard it from somebody else.* I didn't have in mind the Colonel on that. I *assume* he (Kelly) heard it from Celis himself at some point that the Colonel didn't physically sign this document.

Mr. Fiske: That part of the question is totally improper (Tr. 586) . . .

(Tr. 588) Mr. Hallinan: No. I had in mind Celis, what Celis later told him.

Mr. Fiske: He cannot ask him (Kelly) what he heard.

The Court: I agree with you, but I didn't know that.

Mr. Fiske: It seems to me the fair way to straifhten this out now is to let me put it back to Kelly that when he said — *because this is the only way we can correct the record fairly at this time — is when he said he heard that Colonel Rodriguez had not signed the end* (Tr. 589) *use certificate, he heard thát that is what the Colonel himself said. I think that puts it right in the context —*

Mr. Hallinan: How can the government do that when they know the contrary?

Mr. Lang: Are you sure he didn't know about it before?

Mr. Hallinan: You know the Colonel didn't physically sign that document.

Mr. Lang: Couldn't he have known about that before the arrest?

Mr. Fiske: No.

The Court: From what I understand he didn't.

Mr. Fiske: There is a long story, your Honor, as to how that end use certificate got *signed.*

Mr. Hallinan: The longer the better.

Mr. Fiske: *It is not* to come in through double

> hearsay, through what Gold[14] told Kelly *that Celis or Suarez told him* |*Gold*| *three days ago,* which is what Mr. Hallinan is trying to do." (Tr. 589). (Italics and matter in parenthesis added.)

The prosecutor, instead of disclosing the facts known to him that he knew prior to the return of the indictment that Rodriguez did not sign the end use certificate and that Celis had forged Rodriguez signature thereto, misrepresented to the trial court and defense counsel that Assistant United States Attorney Robert Gold had learned only "*three days ago,*" which would be September 25, 1976), something that "Celis or Suarez told him three days ago" (Tr. 589; 626). In fact, as the record plainly shows, Assistant United States Attorney Robert Gold (and this prosecutor), learned on and prior to May 26, 1976 that Rodriguez *did not sign* the end use certificate and that Celis had *forged* Rodriguez' signature thereto (Pet. 12a-20a).

The prosecutor persisted in misrepresenting to the trial court and defense counsel that Kelly's information that Rodriguez did not sign the end use certificate arose from his learning of Rodriguez' denial in Rodriguez' alleged post-arrest statement (Tr. 590, 593):

> Mr. Fiske: I am perfectly willing to straighten this out by just simply making it clear that his (Kelly's) answer referred to the Colonel's post-arrest statement (Tr. 590) . . . It seems to me with the answer that we have on the record now, the fair thing to do — *and it is true* — is let Agent Kelly say that when he said he heard that the Colonel did not sign the end use certificate, that was referring to the statement that the Colonel had made after his

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14. Assistant United States Attorney Robert Gold, an assistant prosecutor in this case. Tr. 1, September 21, 1976; Pet. 129.

arrest" (Tr. 591; 630-631). (Italics and matter in parenthesis added.)

This was *not true.* The prosecutor deliberately misrepresented to the trial court and defense counsel. The prosecutor continued to conceal the facts known to him that *Miguel Celis had forged Rodriguez' signature onto those three blank sheets of letterhead paper* (Pet. pp. 12a-20a). This misrepresentation is all the more grave because Kelly had testified that he was not present at the so-called Rodriguez post-arrest statement (Tr. 591-592). The prosecutor's response was disingenous: "Somebody told him that the Colonel had denied it." (Tr. 592; also, Tr. 630-631.)

After that sequence, the prosecutor continued to introduce evidence to the jury that *Rodriguez had signed the end use certificate* described in the indictment. The prosecutor referred to the end use certificate (Government Exhibit 31) and asked government witness Timothy Gomez (who was merely the messenger who allegedly delivered the three papers |described at indictment paragraph 11(b) in Court 1| to the State Department for filing) who signed it and had Gomez *read* the exhibit typing and the typed identification there:

> "Q. Was there a signature line on that end user certificate? A. Yes.
>
> Q. . . . Was there a signature on the document? A. Yes.
>
> Q. *Do you recall what that description said?*
>
> A. *Well, I believe it was the Colonel — I don't remember the full name — but a Colonel Rodriguez and I think it had his title there, but I don't recall specifically* (Tr. 609) what it was."[14b]

14b. Gomez had no personal knowledge of the matter of which the prosecutor elicited his testimony. The prosecutor knew that, yet elicited that incompetent and false testimony.

In another robing room conference, the prosecutor repeated the government's persistent and consistent theory and proof in this case that Rodriguez signed the end use certificate dated April 22, 1976, as follows:

> (Tr. 715) ". . . As to the third count, your Honor, the so-called end use certificate, the testimony of Mr. Kelly was that both Mr. Geraldo[15] and Mr. Celis stated on May 2nd, that *Colonel Rodriguez had signed it* — had agreed to provide the end use certificate, and that *he had signed a document in blank*, which was to be filled in with the necessary (Tr. 716) information. Colonel Rodriguez, in his post-arrest statement, denied that he had signed the document:
>
> "I submit, your Honor, if you would look at the specific exhibits, the DSP-83 and the end use certificates, and the other document that was signed in blank, there is a remarkable similarity of the signatures. Notwithstanding that, your Honor, it seems to me there is a degree of *inherent reliability in what* Celis and Geraldo[16] stated that Colonel Rodriguez had agreed to provide the document, otherwise, your Honor, we have a man who has no connection with the government of El Salvador, Mr. Celis, who, by Colonel Rodriguez' post-arrest statement, is described as a friend of his, coming to the United States, *turning over a document* which he knows is going to be found in the United States State Department, *bearing the signature of Colonel Rodriguez*, and it seems to me

15. See footnote 4, supra. Kelly did not testify that Geraldo said that Rodriguez signed those three blank sheets of letterhead paper. Kelly testified that Miguel Celis said that (Tr. 252-254). See also footnotes 11, 12b, and 23. The prosecutor reiterated that false information; supra pp. 4, 5.

16. See footnote 15, supra.

your Honor, that in terms of just *inherent reliability* no one is going to do that. With all the testimony there was at the meeting about what happens when the State Department checks with Colonel Rodriguez, nobody is going to do that (*turning over a document*) unless he is certain that he has the consent and authority of the third highest ranking official in the government (Tr. 717) his friend, to do it." (Tr. 718) (*turning over a document*). (Italics and matter in parenthesis added) (Tr. 718).

The prosecutor declared that the end use certificate was *signed by Rodriguez, and* that Celis' statement to Kelly that *Rodriguez signed the end use certificate* had "inherent reliability" (Tr. 716).

The prosecutor's reference to "*the consent and authority of*" Colonel Rodriguez, was to Celis' "*coming to the United States, turning over a document* bearing the signature of Colonel Rodriguez" (Tr. 716-717). The *consent and authority*" reference in that robing room conference was solely and clearly to Celis' "*coming* to the United States, *turning over* a document bearing the signature of Colonel Rodriguez (Tr. 716-717)." The prosecutor reiterated there that the end use certificate was signed by Rodriguez, that it bore *his signature*. There was not the faintest suggestion to the trial court by the prosecutor of the true facts known to them, *that Miguel Celis had forged Rodriguez' "signature" onto the end use certificate.* (Pet. 12a-20a).

> "Colonel Rodriguez is the man who Mr. Geraldo[17] contacted in El Salvador who agreed to provide the documentation for $75,000 in cash . . ." (Tr. 742) (Tr. 748) . . . You heard Agent Kelly testify . . . (Tr. 749) that Mr. Celis from El Salvador had come up with him and had actually brought

17. See footnote 15.

with him a document bearing the letterhead of Estado Mayor and something else on it that looks to me like a seal, *carrying the signature of Manuel Alfonso Rodriguez*, and that it was up to the people in New York that knew exactly what the State Department needed to fill in the language that would be necessary for the end use certificate . . . That's what Celis said. Michaelson himself said the same thing. (Tr. 750) . . . In any event, on May 4 the documents are completed, the purchase order, *the end use certificate bearing that signature, and the export license, all of* which werfe given to Mr. Gomez who went to Washington . . . filed them (Tr. 750) . . . Agent Kelly had heard separately from Geraldo,[17a] Celis, Alvarez and Tobocman that *Colonel Rodriguez had signed the documentation* . . . (Tr. 752) . . . As to Colonel Rodriguez, the indictment that will be presented to you contained two counts: the conspiracy count and Count 3, which is the count relating to the end use certificate, which is the document which Mr. Celis and Mr. Geraldo[18] brought back from El Salvador prior to the meeting of May 2nd."[19] (Tr. 762).

The prosecutor later, in passing, stated briefly to the jury that:

> (Tr. 764) "As to the substantive count, Count 3, the end use certificate which Mr. Celis and Mr. Geraldo brought up from El Salvador on May 2nd, there is no proof in this case that Colonel

17a. See footnote 15.

18. See footnote 15 (Tr. 252-254).

19. The prosecutor reminded the jury of Kelly's testimony that Miguel Celis said to Kelly that Rodriguez signed all three sheets of letterhead paper in blank (Tr. 252-254).

Rodriguez actually signed that document. We are *not contending* in the absence of that proof that he actually did in fact sign it. I say to you that makes no difference whatsoever. If you find, as I submit you must from this evidence that *that signature* was put on *that document*, however it got on there, with the knowledge, consent and authorization of Colonel Rodriguez, then he is equally responsible as if he had signed it himself. I ask you just to consider for a moment the evidence that supports irrefutably *that conclusion*. You have the statements of Mr. Celis, Mr. Geraldo,[20] Mr. Tobocman, Alvarez and Michaelson[20a] as to Colonel Rodriguez' role in this case long prior to May 2nd, long prior to the time that *that document* was brought up here, long prior to the time *it was filed* with the State Department. Ask yourself one very simple question.

As his Honor will charge you I am sure tomorrow, and if he does not I think all of the lawyers would join me in telling it (Tr. 764) (Tr. 765) to you now, basically deliberations in a jury room comes down to the exercise of common sense. Does it make any sense whatsoever to you that a man like Celis, described by Colonel Rodriguez as his friend, would come to the United States bearing a document,[21] the *signature of Colonel Rodriguez*, knowing as he did that *that document* was going to

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20. Special Agent Kelly gave hearsay testimony of what those persons said to him that Rodriguez signed the end use certificate. None of those persons was a witness at trial.

20a. See footnote 15.

21. Probably a typographical error and probably should read: Does it make any sense whatsoever to you that a man like Celis, described by Colonel Rodriguez as his friend, would come to the United States *with a document bearing the signature of Colonel Rodriguez* . . . . .

be filed with the United States State Department, knowing as he did from the discussions on May 2nd, May 3rd, and May 4th that the State Department might inquire of Colonel Rodriguez, 'What's this all about', and you heard all the testimony as to what they were going to do to be protected in case that happened, does it make any sense in the world to you that a man like Celis would come up here with a name of the Chief of Staff of the Armed Forces of his country on that kind of document unless *he* was satisfied and unless *he* knew that he had the *consent and authorization of Colonel Rodriguez* to do it?"[22] (Tr. 764-765).

The defense counsel for Rodriguez challenged the prosecution in his summations that Rodriguez did not sign the end use certificate (Tr. 806):

> "He (Kelly) has heard that Celis says that Colonel Rodriguez *signed* this end use certificate in blank. Now, you have to listen very carefully to hear how the government handled that in their summation. They are not claiming — did you hear him say it — that the Colonel physically put that name on that document. And I tell you you know certainly that the Colonel *did not sign that document.*" (Italics and matter in parenthesis added)

The defense counsel argued that the prosecutor had shifted the case against Rodriguez "because . . . he conceded on his summation, practically, that there was little proof, real proof, practically conceded that it wasn't the Colonel's signature on the end use certificate . . . I think

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22. "It" refers clearly to the preceding words: "does it make any sense in the world to you that a man like Celis *would come up here*, . . ." with a document bearing the "name" of Rodriguez.

that what you are reduced to is Celis's statement or others' statements to Kelly. It is pure hearsay. There is nothing you can really put your finger on in this record that is solid evidence that ties Colonel Rodriguez—" (Tr. 849). The prosecutor responded that *"I don't think the proof is any different now than it was before"* (Tr. 850). The trial court confirmed that view, stating: "I don't think it is. The same ruling will apply now" (Tr. 850). (Italics and matter in parentheses added). It is clear that the prosecutor continued to claim that Rodriguez had signed the end use certificate (Tr. 850). The prosecutor further confirmed that claim by submitting to the trial court government request to charge number 29. That government request to charge included the following:

> *". . . With respect to Count Three, the statement which the Government contends was made in Government's Exhibit 31, an 'end user' certificate, typed in Spanish and bearing the signature of Manuel Alfonso Rodriguez . . .".*

The trial court granted that government request to charge and made a small modification, to wit: "With respect to Count 3 the statement that the government contends was false was Government's Exhibit 31, end use certificate, typed in Spanish, and bearing a signature *which purported to be that* of Manuel Alfonso Rodriguez". (Tr. 894) (Italics added.)

This charge to the jury (Tr. 894) as requested by the government was a clear reiteration by the government of its deliberate, persistent and consistent claim that Rodriguez signed the end use certificate. That charge to the jury, as modified by the trial court, directly presented to the jury for its decision the government's consistent claim that Rodriguez signed the end use certificate. There was no other view of the evidence that the jury could have had. All of the government's evidence and arguments was that

Rodriguez had signed the end use certificate. That was false. The government at all times knew that Miguel Celis had forged Rodriguez' "signature" on the end use certificate by tracing it thereon (Pet. 17-39; 12a-20a; 21a-24a).

POINT II

THE GOVERNMENT WILFULLY CONCEALED AND FAILED TO DISCLOSE ESSENTIAL, CRITICAL MATERIAL EXCULPATORY EVIDENCE.

The government, at page 7, footnote 6, of its brief, stated that:

> Petitioner's claim that the government violated its obligation under Brady v. Maryland, 373 U.S. 83, by not disclosing to the defense that Miguel Celis had forged the signature of Rodriguez' on the end use certificate (Pet. 41) carries little weight, since defense counsel conceded to the district court that he had already been told that Rodriguez' signature had been placed on the document by someone else."

The government's assertion is not correct. It is an out of context, non-sequitur.

It was no secret to defense counsel that *Rodriguez did not sign the end use certificate*, or any of them, because Rodriguez already knew *he did not sign any of those papers*. The critical exculpatory evidence was that *Miguel Celis had forged the signature of Rodriguez onto those three blank sheets of letterhead paper by tracing it thereon.* (Pet. 12a-20a). The defense did not know those facts. The prosecutor however, did know those critical facts (Pet. 12a-20a). The prosecutor not only concealed those facts, but worse, presented argument and evidence to the jury and to

the trial court that *Rodriguez signed those "signatures" on Government Exhibits 11, 15, 19, and 31* (Pet. 21-39), when he knew that was false (Pet. 17-20, 12a-20a, *supra*, Point I.)

The defense could only *guess*, by way of mere *argument* to the jury, that "somebody has to trace or forge" the signature of Rodriguez on the end use certificate (Tr. 806-807). On the other hand, defense would not have had to guess by way of mere argument to the jury, if the prosecutor had carried out his duty to disclose the critical evidence known to him that *Miguel Celis had in fact forged the signature of Rodriguez by tracing it thereon* (Pet. 12a-20a). That evidence would have been available to present to the jury and Rodriguez would have been acquitted. That evidence, if it had been before the jury, would either have precluded the prosecution from presenting the false evidence that it did that Rodriguez had signed the end use certificate, or if the prosecutor persisted in that course, would have thoroughly discredited the prosecutor's false evidence. The result would be that Rodriguez would have been acquitted.

After both sides rested, the trial court, out of the presence of the jury, heard motions by the defense to dismiss the counts of the indictment (Tr. 701-722). Defense counsel argued that the only witness who connected Rodriguez to Count 3, the end use certificate, was Agent Kelly, and that his testimony on that score was what "Celis says, somebody else says, somebody else says, pure hearsay . . . Not one iota of competent direct evidence to tie the Colonel in on a substantive count to the filing of that . . . There is not iota of direct evidence in this case tying the Colonel to that document" (Tr. 707-709). The prosecutor responded to that argument by defense counsel by expressly representing and arguing to the trial court that the evidence showed that *Rodriguez had signed the end use certificate* described in Count 3 (Tr. 715-716):

> "As to the third count, your Honor, the so-called end use certificate, the testimony of Mr. Kelly was

> that both Mr. Geraldo[23] and Mr. Celis stated on May 2nd, that *Colonel Rodriguez signed it* — had agreed to provide the end use certificate, and that he had signed a document in blank, which was to be filled in with the necessary information." (Tr. 715-716). (Italics added)

The prosecutor even noted that Rodriguez had "*denied* that he had signed that document" (Tr. 716). Having said that, however, the prosecutor then argued further that the evidence showed that Rodriguez had signed the end use certificate (Tr. 716-722). The prosecutor argued that the signature which appeared on a DSP-83 form, which defense counsel had stipulated during trial was signed by Rodriguez (Tr. 256-257), when compared to "the end use certificate and the other document that was signed in blank,[24] there is a remarkable similarity." (Tr. 716). The prosecutor argued to the trial court in opposition to defense counsel's motion to dismiss Count 3, that Rodriguez had signed the end use certificate, and that Kelly's testimony that *Celis had told Kelly that Rodriguez had signed those three letterhead sheets of paper in blank* (Tr. 253-254) had "inherent reliability", ". . . it seems to me that there is a degree of inherent reliability in what Celis and Geraldo[25] stated, that Colonel Rodriguez had agreed to provide the document, otherwise your Honor, we have a man who has no conviction with the government of El Salvador, Mr. Celis, who, by Colonel Rodriguez' post-arrest statement, is described as a friend of his, *coming to the United States, turning over a document* which he knows is going to be

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23. See, footnote 11. Kelly did not testify that Geraldo told him that Rodriguez signed the three sheets of letterhead paper in blank. Kelly testified that Miguel Celis told him that Rodriguez had signed the three sheets of letterhead paper in blank (Tr. 253-254).

24. Referring to Government Exhibit 11 (See, Pet. 21a; Tr. 253-254). Also, see footnote 11.

25. See footnotes 11 and 23.

found in the United States State Department, *bearing the signature of Colonel Rodriguez*, and it seems to me, your Honor, that in terms of just inherent reliability no one is going to do that.[26] With all the testimony there was at the meeting about what happens when the State Department checks with Colonel Rodriguez, nobody is going to do that[27] unless he is certain that he has *the consent and authority* of the third ranking official in the governbment, his friend to do it."[28] (Tr. 716-717). The prosecutor continued to argue and assert that Rodriguez *signed* the end use certificate, to wit, "As to Count 3, your Honor, it is a completely different situation and a far stronger one, because *there the document that is the subject is a document with which Colonel Rodriguez himself is directly linked.*" (Tr. 717-718).

The prosecutor thereafter argued and misrepresented to the trial court that Rodriguez' denial that he signed the end use certificate should be disregarded as a false exculpatory statement:

> "It seems to me your Honor is entitled to take his denials with respect to his signature in the context of the other false exculpatory statements that are contained in that document."[29] (Tr. 719)

Rodriguez' defense counsel complained that the prosecutor had said "in chambers, that the government would not claim that the colonel physically signed that, and I don't think they can either argue to your Honor or argue

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26. "That", being "coming to the United States, turning over a document . . . bearing the signature of Colonel Rodriguez."

27 & 28. "It", being "coming to the United States, turning over a document . . . bearing the signature of Colonel Rodriguez."

29. Referring to the alleged Rodriguez post-arrest statement.

to this jury in good conscience the similarity of signature."[30]

The prosecutor showed that, in his mind, through his semantic exercises, his words that "our claim that the signature was put on the document with Colonel Rodriguez' full consent, knowledge and authority" (Tr. 255, 720) meant that *Rodriguez signed the end use certificate*. The prosecutor had made this same representation, this same "claim", at the September 24, 1976 robing room conference on the fourth day of the trial, which was the second day of Kelly's direct examination (Tr. 255). (*Supra*, 1-7).

The prosecutor further evidenced that those words, ". . . full consent, knowledge and authority" meant to him (the prosecutor), that *Rodriguez signed the end use certificate* by the following:

> "Mr. Fiske: Yes, but our *claim*, your Honor, is that the *comparability of the signatures is a relevant fact in determining whether that signature was put on there with the knowledge, consent and authority of Colonel Rodriguez*. It is part of the same argument we are making when we say that Celis, who was his friend, would not *come* to the United States and *turn over a document* which was going to be filed with the State Department, leading to an inquiry to Colonel Rodriguez, unless he had the knowledge, consent and authority of Colonel Rodriguez to do it."[31] (Tr. 720-721). That the prosecutor continued to *claim* that *Rodriguez signed the end use certificate* is further evidenced

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30. See, Tr. 256-257, 315-316, re DSP-83 form. The prosecutor was arguing that the stipulated signature of Rodriguez had a remarkable similarity to the end use certificate signature (Government Exhibit 31) thus both were signed by Rodriguez.

31. "It", being, as in footnotes 27, 28, to *come* to the United States and *turn over* a document. See also footnote 30.

by the prosecutor's submission to the trial court of the request to charge number 29 (Tr. 727), that *Rodriguez signed the end use certificate*, to wit:

> "With respect to Count 3, the statement that the government contends was false was Government's Exhibit 31, end use certificate, typed in Spanish *and bearing the signature of Manuel Alfonso Rodriguez.*"

The trial court ruled that government's request to charge number 29 was "substantially granted" (Tr. 727) (See tr. 894). Apparently, in view of the evidence in the record, in the form of the alleged Rodriguez post-arrest statement wherein Rodriguez had denied that he signed the end use certificate (Tr. 256-257, 315, 316), the trial court modified government request to charge number 29 to be as follows: "With respect to Count 3, the statement that the government contends was false was Government's Exhibit 31, end use certificate, typed in Spanish, and bearing a signature *which purported to be that of Manuel Alfonso Rodriguez*" (Tr. 894). The government plainly continued to *claim* that *Rodriguez signed the end use certificate.* The jury was directly presented with the question for their determination whether Rodriquez signed the end use certificate as "claimed" by the prosecutor, or did not sign the end use certificate. There was no other question before the jury.

The prosecutor at all times knew that Rodriguez did not sign the end use certificate (Pet. 12a-21a). The prosecutor at all times knew that *Miguel Celis had forged Rodriguez' aignature on the end use certificate* (Pet. 12a-21). But the prosecutor concealed this critical decisive evidence from everyone. Worse, the prosecutor continued to represent and argue to the jury and the trial court that *Rodriguez signed the end use certificate.*

In his closing argument to the jury, the prosecutor continued to argue his claim that *Rodriguez signed the end*

use certificate. (Tr. 741, 742, 748-749, 752). The prosecutor reviewed the government's evidence that Rodriguez had signed the end use certificate in blank (Tr. 741-742, 748-749, 752). The prosecutor argued to the jury:

> (Tr. 741) "Basically what this whole case is about, . . . was to file false documents with the State Department in order to get a false export license . . . The key to the whole scheme, the key to the whole concept of obtaining a false export license, was the paying of the end use certificate . . . a false statement by a high official of a foreign government (Tr. 742) that his government in fact was buying the guns . . . *Colonel Rodriguez is the man . . . who agreed to provide the documentation* . . . (Tr. 742) . . . (Tr. 748) On May 2nd . . . Mr. Geraldo[31a] came back to the United States on May 2nd and at a meeting that you heard Agent Kelly testify[32] about he told Agent Kelly and the others that he had obtained Colonel Manuel Rodriguez, Chief of Staff of the Armed Forces of El Salvador who had agreed to provide the end use certificate. (Tr. 749). He[33] further said that Mr. Celis from El Salvador had come up with him and had actually brought with him a document bearing the letterhead of Estado Mayor and something else on it that looks to me like a seal, *carrying the signature of Manuel Alfonso Rodriguez*, and that it was up to the people in New York that knew exactly what the State Department needed to fill in the language that would be necessary for the end

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31a. See footnote 15c.

32 & 33. See footnotes 11, 15, 23.

use certificate. That's what Geraldo[34] said, that's what Celis said.[35] Michaelson himself said the same thing.[36] . . . On May 3rd and May 4th you heard the testimony about what happened with the preparation of the documents, Alvarez actually dictating the language of the end use certificate, Exhibit 31, to Geraldo, Geraldo writing it down in Spanish, taking it over to Wittington where it was typed up, wrongly, as you heard the next day, they had to add another paragraph, you heard the argument between Alvarez and Geraldo about why the documents had been prepared wrong (Tr. 750). In any event, on May 4th the documents are completed, the purchase order, *the end use certificate bearing that signature* and the export license, all of which were given to Mr. Gomez who went to Washington . . . This, you may recall, the call was made because there was a question about when and how Colonel Rodriguez pay the $75,000 that Geraldo and Celis and Michaelson *said*[37] that he demanded in return for providing *this* documentation . . . (Tr. 750) . . . Agent Kelly heard separately from Geraldo, Celis, Alvarez and Tobocman that *Rodriguez had signed the documentation* (Tr. 752) . . . As to Colonel Rodriguez, the indictment that will be presented to you contained two counts: The conspiracy count and Count 3, which is the count relating to the end use certificate which is the document which Mr.

34, 35 & 36: The reference is to what Kelly testified that these persons read to him. As set forth in footnotes 11 and 23, Kelly did not testify that Geraldo said to him that Rodriguez signed the three sheets of letterhead paper in blank which Celis produced for Kelly on May 2, 1976 (Tr. 253-254).

37. See footnotes 34, 35, 36, 11, 23.

Celis[38] and Mr. Geraldo[37a] brought back from El Salvador prior to the meeting of May 2nd. (Tr. 762)

After the prosecutor had thus repeatedly, aggressively, persistently and consistently represented, claimed, argued, and presented evidence that *Rodriguez signed the end use certificate*, the prosecutor came up with a single, isolated, ambiguous, contradictory and utterly odd bit of semantics that:

> "As to the substantive Count 3, the end use certificate *which Mr. Celis* and Mr. Geraldo[38] *brought up from* El Salvador on May 2nd,[39] *there is no proof in this case that Colonel Rodriguez actually signed that document. We are not contending in the absence of that proof that he actually did in fact sign it. I say to you it makes no difference. If you find, as I submit you must, that that signature was put on that document, however it got on there, with the knowledge, consent and authorization of Colonel Rodriguez, then he is equally responsible as if he had signed it himself.*[39a] I ask you to consider for a moment the evidence that supports irrefutably that conclusion.[40] You have the statements of Mr. Celis.

37a. See footnote 15.

38 & 39. See footnotes 11, 23, 34, 35 and 36.

39a. See footnote 9; also p. 6 supra.

40. *All* of the government "evidence" was that *Rodriguez signed the end use certificate*. There is not a scintilla of evidence that anyone else signed the end use certificate. Kelly testified that on May 2, 1976, he met with Miguel Celis in a restaurant in Westchester County, that Celis produced three blank sheets of letterhead paper signed with a signature which Celis stated to Kelly was signed by Rodriguez. (Tr. 252-254; Point 1☐ Pet. 17-39).

There was absolutely no evidence which would present any issue, in any form, that someone else, not Rodriguez, signed the end use certificate; there was absolutely no evidence therefore, from which the government might

Mr. Geraldo, Mr. Tobocman, Alvarez, and Michaelson as to Colonel Rodriguez' role in this case long prior to May 2nd, long prior to the time that *that* document was brought up here, long prior to the time that it was filed with the State Department.[41] (Tr. 764).

The prosecutor's subsequent statements in that summation showed that he meant that *Rodriguez signed the end use certificate, and said so:*

"Does it make any sense whatsoever to you that a man like Celis, . . . would come to the United States bearing a document, the *signature of Colonel Rodriguez*, knowing as he did that that document was going to be filed with the United States State Department, knowing as he did from the discussions on May 2nd, May 3rd and May 4th that the State Department might inquire of Colonel Rodriguez, 'What's this all about', and you heard all the testimony as to what they were going to fo to be protected in case that happened, does it make any sense in the world to you that a man like Celis would come up hwere 'with a name of the Chief of Staff of the Armed Forces of his country on that kind of a document[42] unless he was

construe these odd and starkly out of place statements of the prosecutor, as a statement by the prosecutor that *Rodriguez did not sign the end use certificate.* These words are similar to the words stated by this prosecut' 'n a robing room conference. (See footnote 9 and 39a) which are set forth above, which show that the prosecutor was saying that *Rodriguez signed the end use certificate.*

41. See, footnotes 11, 23, 34, 35, 36. None of those persons named testified at trial. Kelly testified that they said certain things—all hearsay. The prosecutor is reiterating that which he had consistently presented to the jury and the trial court that Rodriguez had signed the end use certificates, in all of their forms. (See Pet. 21a-24a).

42. "That document" that had the name—the "signature" of Rodriguez on it was three blank sheets of letterhead paper produced on May 2, 1976 by Miguel Celis to Special Agent Kelly (Tr. 253-254).

satisfied and unless he knew that he had the consent and authorization of Colonel Rodriguez to do it?"[43] (Tr. 765).

CONCLUSION

THE PETITION SHOULD BE GRANTED.

The petition presents clear proof of grave violations of petitioner's constitutional rights by the knowing use of false material evidence by the government and by the concealment and failure to disclose by the government that Miguel Celis had forged Rodriguez' "signature" on the end use certificate by tracing it thereon, in addition to other stated grounds set forth in the petition.

The petition should be granted.

Respectfully submitted,

/s/ Bernard G. Ehrlich
BERNARD G. EHRLICH

Of Counsel:
Charles Sutton

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New York, New York

43. "It", refers to Celis 'coming to the United States Court *bearing a document having the signature of Colonel Rodriguez.*' (Tr. 765) See also, footnotes 27, 28, 31.